No. 92-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN L. STEINBRINK, *et al.*,
Petitioners,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Second Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL.,* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether Section 92 of the National Bank Act, granting insurance agency powers to national banks in small towns that are "in addition to the powers now vested by law in national banking associations," constitutes an implied limitation upon the incidental powers of national banks, granted elsewhere in the statute, where such banks are located in larger towns.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Interest of the Amici Curiae	1
Reasons for Granting the Writ	2
I. The Conflicts Among the Circuits	2
II. The Important Question of Federal Law	10
Conclusion	13

TABLE OF AUTHORITIES

Cases:	Page
American Insurance Association v. Clarke, 865 F.2d 278 (D.C. Cir. 1988)	11
American Land Title Association v. Clarke, 772 F. Supp. 1353 (S.D. N.Y. 1991)	3
American Land Title Association v. Clarke, 968 F.2d 150 (2d Cir. 1992)	4
Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986)	9
Clarke v. Securities Industry Association, 479 U.S. 388 (1987)	3
Crawford Fitting Company v. J.T. Gibbons Inc., 482 U.S. 437 (1987)	9
First National Bank of Eastern Arkansas v. Taylor, 907 F.2d 775 (8th Cir.), *cert. denied*, 111 S.Ct. 442 (1990)	6
Independent Bankers Association of America v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980)	5,10
Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System, 736 F.2d 468 (8th Cir. 1984)	5
Independent Insurance Agents of America v. Clarke, 955 F.2d 731 (D.C. Cir. 1992)	3
Saxon v. Georgia Association of Independent Insurance Agents, 399 F.2d 1010 (5th Cir. 1968)	5
Securities Industry Association v. Clarke, 885 F.2d 1035 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990)	7
Variable Annuity Life Insurance Co. v. Clarke, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.)	11

Table of Authorities Continued

Page

Statutes:

12 U.S.C. § 24 (Seventh) ..... *passim*

12 U.S.C. § 92 ..... *passim*

Act of Sept. 7, 1916, ch. 461, 39 Stat. 752 (1916) 2

Miscellaneous:

Comptroller Interp. Letter No. 499 [1989-90 Transfer Binder] Federal Banking Law Rep. (CCH)— 83,090 (Feb. 12, 1990) 11

Comptroller Interp. Letter No. 331 [1985-87 Transfer Binder] Federal Banking Law Rep. (CCH)— 85,501 (April 4, 1995) 11

McFadden American Bank Directory, Spring, 1992 (Arkansas) 11

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association, Association of Bank Holding Companies, Association of Banks in In-

surance and Consumer Bankers Association are all national trade associations of the commercial banking industry. A large majority of commercial banks in the United States, their employees or the bank holding companies that own them are members of one or more of the associations. The Minnesota, Missouri and Wisconsin Bankers Associations are the principal trade associations for the banking industry within their respective states. All of the associations represent the interests of both national banks and state-chartered banks in the legislatures, regulatory agencies and in the courts on issues that are of widespread importance to the industry. This is such a case for the reasons set forth below.

REASONS FOR GRANTING THE WRIT

I. The Conflicts Among the Circuits

There are two conflicts among the circuits presented in this case. The first is whether or not Section 92 of the National Bank Act continues to exist; the second is over how to construe Section 92 assuming it does exist. For purposes of *this* case, the second is the more important of the two.

Section 92 of the National Bank Act was enacted in 1916. It was designed to grant to those national banks located and doing business in small towns the power to engage in the general insurance agency business. The opening clause of Section 92 provided that this power was to be "in addition to the powers now vested by law in national banking associations."[1] Among the powers then and now vested in national banking associations was the power to exercise "all

[1] Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916).

such incidental powers as shall be necessary to carry on the business of banking."[2] The Comptroller of the Currency is charged with the interpretation and enforcement of these and other provisions of the National Bank Act. *Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04 (1987).

In this case, Chase Manhattan, located and doing business in New York City, sought and received the approval of the Comptroller to engage in the business of selling title insurance as agent, as an exercise of its "incidental powers." The District Court upheld the Comptroller's action. *American Land Title Association v. Clarke*, 772 F. Supp. 1353 (S.D.N.Y. 1991).

On appeal, the Second Circuit reversed. In doing so, each of the court's two key holdings place the Circuit's decision in direct and irreconcilable conflict with decisions of other U.S. Courts of Appeals.

The most obvious conflict is with a District of Columbia Circuit opinion handed down four months earlier in *Indcpendent Insurance Agents of America v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992), and it concerns the very existence of Section 92 of the National Bank Act. Because of two arguably misplaced quotation marks in the statute enacting Section 92, subsequent legislation, enacted only two years later and on an entirely unrelated subject, is said to have repealed Section 92. The District of Columbia Circuit concluded that Congress did what it did, and that "section 92 has ceased to exist." *Id.* at 739. The Second Circuit, in the case below, explicitly disagreed with the District of Columbia Circuit, holding that whatever hap-

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[2] 12 U.S.C. § 24 (Seventh).

pened in 1918 did *not* effect a repeal of Section 92. *American Land Title Association v. Clarke*, 968 F.2d 150, 152 (2d Cir. 1992).

Obviously, this conclusion by the Second Circuit is absolutely critical to its ultimate holding. If Section 92 does not exist, then there is no basis upon which the court could find a "limitation" upon the incidental powers of national banks. It would have to have reached the question (which it declined to reach) whether title insurance agency activities fit within the incidental powers clause of the National Bank Act, and the decision cannot stand.

The respondent title associations, the Comptroller of the Currency, and your amici *all* take the position that the Second Circuit's decision upholding the continued existence of Section 92 is correct. Chase Manhattan does not take a contrary position. (*See Chase Manhattan Bank v. American Land Title Association*, No. 92-482, Pet. for Cert. at 12-13). The conflict between the Second and the District of Columbia Circuits is before the Court on petitions for writ of certiorari to review the District of Columbia Circuit opinion in the *Independent Insurance Agents* case. *Steinbrink v. Independent Insurance Agents of America*, No. 92-507; *U.S. National Bank v. Independent Insurance Agents of America*, No. 92-484. The Court can and should resolve the conflict over the existence of the statute in the context of those cases.

But doing so will not resolve the *second* conflict among the circuits that is created by the decision below in this case. If Section 92 does exist, is it an implied limitation upon the insurance powers of national banks in large towns or is it an independent grant of insurance powers to national banks in small

towns? That conflict is separate and distinct, and survives the outcome of the dispute over the existence of Section 92.

The Petitions for Writ of Certiorari in this and its companion case correctly point out that the decision of the Second Circuit here and of the Fifth Circuit in *Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968) both construe Section 92 of the National Bank Act as a limitation upon the rights of national banks located in larger jurisdictions to engage in the insurance business, whether or not the particular insurance business in question might be considered "incidental" to banking. On the other hand, the District of Columbia Circuit, in *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), and the Eighth Circuit, in *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468 (8th Cir. 1984), both have clearly rejected the idea that there is that kind of negative inference to be drawn from Section 92.

While your amici agree with the Petitioners on this point, we respectfully suggest that this particular conflict between the circuits is even deeper and perhaps more subtle than it appears at first blush. The conflict has to do with the order in which the respective courts analyze the applicable or arguably applicable statutes in cases testing the powers of banks under the National Bank Act, and the priorities that are assigned to different sections of the law.

Here, the Second Circuit looked *first* at Section 92 of the Act. Having done so, it opted for an easy answer: Title insurance is insurance; insurance can

only be offered by those national banks located in small towns; Chase Manhattan is located in a large town, so it cannot offer title insurance; all other considerations are irrelevant. Had the Second Circuit instead looked first to Section 24 (Seventh) of the National Bank Act, it would have to have analyzed the question whether title insurance agency sales fit within the business of banking or, more precisely, whether the Comptroller of the Currency was within his rights in so concluding. If the court then had decided that title insurance *was* part of the business of banking, it could have dismissed sections of the law governing *non*banking activities as irrelevant—including Section 92. Other courts—even including another panel of the Second Circuit—have done precisely that, and the Second Circuit's failure to do so in this case creates a conflict in the framework for analysis of this particular issue and related ones.

In *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 111 S.Ct. 442 (1990), the bank proposed to offer "debt cancellation contracts" to its customers, alleging (with the agreement of the Comptroller of the Currency and the Comptroller's support as amicus curiae before the Eighth Circuit) that such contracts were within the incidental powers of national banks. The contracts provided that, for a fee, the bank would cancel a borrower's then outstanding indebtedness upon the borrower's death or disability. The Arkansas Insurance Department directed the bank to cease and desist, claiming that the contracts were the functional equivalent of credit life insurance policies and, as such were subject to regulation by the Department, could not be sold without an insurance license, and that

insurance licenses could not be issued to banks in Arkansas. The bank argued that, as a national bank, its powers were governed by preemptive federal law; the Department countered that the federal McCarran-Ferguson Act left regulation of the insurance business exclusively to the states.

The Eighth Circuit looked *first* to Section 24 (Seventh) of the National Bank Act to determine the powers of the national bank in question. It concluded that debt cancellation contracts fit within the incidental powers of banks. The court *then* turned to the statute governing *non*banking activities to determine its applicability to the case at hand. It did not deny that debt cancellation contracts might be "insurance" for state law purposes, but concluded that that was an irrelevant consideration: "*Because* debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they *do not constitute* 'the business of insurance' under the McCarran-Ferguson Act." *Id.*, 907 F.2d at 779.

Had the Eighth Circuit looked first at the statute governing nonbanking activities, as the Second Circuit did in this case, it could well have determined that debt cancellation contracts were insurance and left to the regulation of the Insurance Department, never reaching the "incidental powers" issue. That court examined the arguably applicable statutes in the reverse order from the Second Circuit's, the two decisions therefore being in conflict with one another.

In *Securities Industry Association v. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), Security Pacific National Bank proposed to pool its mortgage loans and sell participations in that

pool to investors. The Comptroller of the Currency approved, and a trade association of the securities industry sued, claiming that the bank would be engaged in underwriting and selling securities in violation of the Glass-Steagall Act. The Second Circuit upheld the Comptroller's approval. It looked *first* at Section 24 (Seventh) of the National Bank Act, and found that that Section granted explicit powers to national banks to negotiate promissory notes or other evidences of debt, and that is precisely what Security Pacific was doing. The Court *then* reached the provisions of law governing the securities business, and found them inapplicable *because* it had already determined the activities to be authorized by the statute governing the banking business:

> Activity that falls within the "business of banking" is not subject to the restrictions the latter part of section 16 places on a bank's "business of dealing in securities and stock." Thus, the issues concerning the definitions of "securities" and "underwriting" only become relevant if the activity constitutes "the business of dealing in securities and stock." If the activity constitutes "the business of banking," then the Glass-Steagall Act prohibitions SIA claims are violated here do not apply.

Id., 885 F.2d at 1048.

In this case, where the court looked first to the statute governing nonbanking activities to determine the powers of a bank, it has acted in conflict with a different panel of the same court.

Obviously, this is not to say that the grant of power to national banks to engage in the business of banking

found in Section 24 (Seventh) can overcome explicit statutory prohibitions against banks engaging in a particular business or in a particular way. But there is no such prohibition here. Even if the Second Circuit is right in holding that the law gives a power in one section of the law and takes it away in another by negative inference, there must still be some principled way to choose which of those two sections actually governs the outcome of a particular case. Here, the Second Circuit claims to follow the rule of statutory construction that the statute addressing the matter under consideration in specific terms controls over one that does so in a general manner. 968 F.2d at 157 (citing *Crawford Fitting Company v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987)). That is an entirely fitting and proper rule of statutory construction where it is applicable. It is not applicable here. There is no reason to think that the term "act as the agent for any fire, life, or other insurance company" found in Section 92 is any more (or less) "specific" than is the term "carry on the business of banking" found in Section 24 (Seventh), nor does the Second Circuit opinion state why that court believes the former to be more specific than the latter. It merely premises its decision upon the unsupported assumption that it is so.

The more appropriate rule of statutory construction to follow—the one that *is* applicable in this case—is the rule that requires courts to give effect to the plain language of the statute. *See, e.g. Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-75 (1986). Here, the court believed it was faced with the prospect of choosing between Section 24 (Seventh) and Section

92. One of those sections directs the answer by its own terms. The powers that are granted by Section 92 are "in addition to the powers now vested by law in national banking associations." With plain statutory language like that, it would seem incumbent upon the courts to decide—first—what those "other powers" might be. That would require looking—first—at Section 24 (Seventh). The fact that the Second Circuit here performed the statutory analysis upside down places it not only in conflict with the decisions of other circuits, but also in conflict with this Court's "plain language" rule of statutory construction.

II. The Important Question of Federal Law

The Petitions for Writ of Certiorari in this case and its companion case correctly point out the impact that the Second Circuit's decision will have upon the operations of a great many national banks if the decision stands and, particularly, if it is followed as precedent elsewhere.

Literally thousands of national banks act as agent in the sale of credit-related insurance—credit life and credit disability—in the exercise of their incidental powers, with the approval of the Comptroller of the Currency (12 C.F.R. § 2.6 (1991)) and the courts, without regard for the size of the jurisdiction in which they are located and doing business. *Independent Bankers Association of America v. Heimann*, *supra*, 613 F.2d 1164.

A substantial and growing number of national banks sell both fixed and variable rate annuities as agents, over the objection by representatives of the insurance industry that annuities are "insurance" products. Such sales are likewise approved by the Comptroller of the

Currency as an exercise of the incidental powers of national banks, again without regard to the size of the town in which the bank operates (Comptroller Interp. Letter No. 499 [1989-90 Transfer Binder] Federal Banking Law Rep. (CCH) ¶ 83,090 (Feb. 12, 1990); Comptroller Interp. Letter No. 331 [1985-87 Transfer Binder] Federal Banking Law Rep. (CCH) ¶85,501 (April 4, 1985), and approved by the U.S. District Court in the only challenge to the Comptroller's approvals. *Variable Annuity Life Insurance Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.).

The Comptroller of the Currency has approved the sale of municipal bond insurance by national banks, including a national bank in New York City, as an exercise of incidental powers of the banks, and the courts have upheld that action. *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

The Comptroller approved the sale of debt cancellation contracts by national banks as an incidental power. The Eighth Circuit upheld that action in *First National Bank of Eastern Arkansas*, *supra*, 907 F.2d 775, even though the bank in question is located in Forrest City, Arkansas, population 13,364.[3]

The Second Circuit's decision is incompatible with all of the above regulatory action and court decisions and, if nothing else, casts doubt upon the validity of considerable portions of the activities of national banks of long standing, undertaken in reliance upon earlier regulatory and judicial approval.

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[3] *McFadden American Bank Directory*, Spring, 1992 (Arkansas) page 23.

But national banks are not the only banks with an important interest in the outcome of this matter. State chartered banks are affected by it as well. In as many as 37 states, there are so-called "wild card" or "parity" statutes.[4] With quite a few variations, these statutes generally provide that state chartered banks may have and exercise any powers that may be exercised by national banks located in the same state, notwithstanding other provisions of state law. In many jurisdictions, the "wild card" statute is the only source of authority for state-chartered banks to engage in one or more of the "incidental" functions described above for national banks. Consequently, if the Second Circuit decision remains unreviewed and unreversed, the loss of "incidental" powers by national banks shall inevitably result in the loss of comparable powers by a great many state chartered banks as well. Like their national brethren, state-chartered banks have invested in the development of "incidental" business and established business relationships with customers over a long period of time in justified reliance upon favorable regulatory and judicial action. The Second Circuit's decision threatens to disrupt much of settled practice, to the great detriment of both national and state chartered banks and their customers. It therefore presents a question of federal law of sufficient importance to warrant review by this Court, even independent of the two conflicts among the circuits that are created by the Second Circuit's decision.

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[4] *See* Appendix to this brief for complete listing.

CONCLUSION

For all of the reasons stated herein and in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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APPENDIX

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Wild Card/Parity Statutes

Alaska	Sec. 06.01.020
Arizona	Sec. 6-184(2)
Arkansas	Sec. 23-32-701(16)
Colorado	Sec. 11-2-103
Florida	Sec. 655.057
Georgia	Sec. 7-1-61(a)(1)
Hawaii	Sec. 403-47.1
Idaho	Sec. 26-1101(3)
Illinois	Ch. 311.¶5(11)
Kansas	Sec. 9-1715
Kentucky	Sec. 287.020
Louisiana	Tit. 6, §242(A)(15), Revised Stat.
Maine	Tit. 9B, §416
Maryland	Sec. 5-504 of Fin. Inst. Art.
Minnesota	Sec. 48.15 (Subd. 2)
Mississippi	Sec. 81-5-1(10)
Missouri	Sec. 362.105.3
Montana	Sec. 32-1-362
Nevada	Sec. 662.015(1)(f)
New Hampshire	Ch. 394-A
New Jersey	Sec. 17:9A-24a and 17:9A-25(12)
New Mexico	Sec. 58-1-54
North Dakota	Sec. 6-03-38
Ohio	Sec. 1125.23
Oklahoma	T.6, §203
Oregon	Sec. 707.340
South Carolina	Sec. 34-1-110
South Dakota	Sec. 51A-2-14
Tennessee	Sec. 45-2-601
Texas	Sec. 342-113(a)(4) of Civil Statutes
Utah	Sec. 7-1-301(3)
Vermont	T.8, §1163

Virginia	Sec. 6.1-5.1
Washington	Sec. 30.04.215
West Virginia	Sec. 31A-3-2(a)(5)(B)
Wisconsin	Sec. 220.04(8)
Wyoming	Sec. 13-3-704